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No. 85-949

In the Supreme Court of the United States

OCTOBER TERM, 1985

ST. REGIS MOHAWK TRIBE, PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether Section 106(b) of the Comprehensive Employment and Training Act of 1973, 29 U.S.C. (Supp. V 1981) 816(b), which stated that the Secretary of Labor "shall" issue a final determination within 120 days of the receipt of a complaint alleging the unlawful use of CETA funds by a grant recipient, barred the Secretary from recovering misused grant funds when he failed to issue a final determination within the 120-day period.

2. Whether the Secretary of Labor had authority under Section 602(b) of the Comprehensive Employment and Training Act of 1973, 29 U.S.C. (1976 ed.) 982(b), to require repayment of funds misspent by a grant recipient prior to 1978.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 769 F.2d 37. The opinion of the administrative law judge (Pet. App. 33-57) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1985. On September 23, 1985, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including

December 2, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (Supp. V 1981) 801 *et seq.*, authorized the Secretary of Labor to grant federal funds to qualified entities, such as states, local government units, and Indian tribes, for programs "provid[ing] job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons." 29 U.S.C. (Supp. V 1981) 801; see also S. Rep. 95-891, 95th Cong., 2d Sess. 4, 42-43 (1978); H.R. Rep. 93-659, 93d Cong., 1st Sess. 1-3 (1973).[1] The statutory scheme was carefully constructed to ensure that programs financed with CETA funds would further the purposes of the Act. Thus, the statute prescribed detailed eligibility standards for participants in CETA programs and set forth the terms and conditions governing the employment of such program participants. See 29 U.S.C. (Supp. V 1981) 823-827; see also 20 C.F.R. 675.5, 676.21 to 676.30a, 676.51 to 676.76. Each grant recipient was required to submit assurances that its program would comply with all applicable statutory

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[1] The statute originally was enacted in 1973 (Pub. L. No. 93-203, 87 Stat. 839 *et seq.*) and was amended substantially in 1978 (Pub. L. No. 95-524, 92 Stat. 1909 *et seq.*). The CETA was repealed effective October 13, 1982, and replaced by the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.* (see Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357). However, the CETA continues to govern administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982, and September 30, 1984 (29 U.S.C. 1591(e)).

and regulatory requirements (29 U.S.C. (Supp. V 1981) 813(a)(21)).

Under the 1973 Act, the Secretary had broad authority to audit grant recipients to assure that funds provided under the Act were used in accordance with the statutory requirements. Pub. L. No. 93-203, § 613, 87 Stat. 882, 29 U.S.C. (1976 ed.) 992. If the Secretary determined that funds had been misspent, he could make necessary adjustments in payments. The Secretary also was empowered, in specified circumstances, to withhold future funds in such cases. § 602(b), 87 Stat. 878, 29 U.S.C. (1976 ed.) 982(b).[2] In the event that the Secretary chose to withhold funds, however, the grantee was not permitted to reduce program operations. 29 C.F.R. 98.15 (1976).

The 1978 CETA amendments similarly stated that the Secretary of Labor could conduct audits of grant recipients "[i]n order to assure that funds provided under [the CETA] are used in accordance with its provisions" (29 U.S.C. (Supp. V 1981) 835(a)).[3]

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[2] The Secretary was authorized to make CETA grant payments prior to the recipient's expenditure of the funds, as reimbursement for past expenditures, or otherwise, as the Secretary deemed necessary to carry out the Act's provisions. § 602(b), 87 Stat. 878, 29 U.S.C. (1976 ed.) 982(b). The Secretary by regulation chose to use an advance-funding method of distributing CETA funds because most recipients were unable to operate on a cost-reimbursement basis. 29 C.F.R. 98.2 (1976).

[3] Typically, an audit was performed or arranged by the Department of Labor's Office of Inspector General and the audit report was forwarded to the Department of Labor grant officer responsible for the particular grant. The grant officer provided the grant recipient with an opportunity to comment on the report, issued an initial determination, offered to at-

In addition, the statute permitted any interested person, such as a program participant, to file a complaint with the Secretary alleging that a grant recipient had failed to comply with CETA standards (29 U.S.C. (Supp. V 1981) 816).

Section 106(b) of the Act, 29 U.S.C. (Supp. V 1981) 816(b), which was added by the 1978 amendments, stated that if the Secretary obtained information—either as the result of an audit or through the receipt of a complaint—concerning a grant recipient's failure to adhere to the Act's requirements, the Secretary was required to investigate the matter. The same provision then stated that "not later than 120 days after receiving the complaint," the Secretary "shall" make a "final determination" regarding the allegation involved (*ibid.*). If after notice to the grant recipient and an opportunity for a hearing, the Secretary found that the grant recipient violated the CETA's requirements, the Secretary expressly was authorized to order the grant recipient to repay any misspent funds to the United States. 29 U.S.C. (Supp. V 1981) 816(b) and (d).

2. Petitioner, a New York Indian tribe, received CETA grants from the federal government in 1975 and 1976 (Pet. App. 2-3, 34-37). On May 5, 1978, a

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tempt informally to resolve the dispute, and then issued a final determination. 20 C.F.R. 676.86(d), 676.88. The grant recipient was entitled to a hearing before an administrative law judge (ALJ) with respect to the grant officer's final determination. The ALJ then rendered a decision that, if not modified or vacated within 30 days, became the final decision of the Secretary. A decision adverse to the grant recipient or another interested person was subject to judicial review in a court of appeals. 29 U.S.C. (Supp. V 1981) 816(b), 817(a); 20 C.F.R. 676.88 to 676.92.

private accounting firm completed an audit of petitioner's grants and thereafter filed an audit report with the Labor Department grant officer who administered the grants (*id.* at 3, 38). The grant officer issued a final determination on September 28, 1981, over three years after completion of the audit. He disallowed $68,334 in costs claimed by petitioner, principally on the ground that petitioner had hired ineligible CETA participants. *Id.* at 4, 41-52.

Petitioner sought review of the grant officer's determination before an administrative law judge (ALJ). The ALJ found that petitioner had incurred $39,045.03 in costs in violation of CETA regulations and ordered the repayment of these funds to the United States (Pet. App. 4, 40-52, 56). Petitioner argued that the 1973 CETA did not authorize recoupment by the Secretary of misspent grant funds. Relying on *Bell* v. *New Jersey*, 461 U.S. 773 (1983), which held that the Elementary and Secondary Education Act of 1965 authorized the Secretary of Education to recoup misused grant funds, and on *Atlantic County* v. *United States Department of Labor*, 715 F.2d 834 (3d Cir. 1983), which applied the principles set forth in *Bell* to the 1973 CETA, the ALJ held that "the right of * * * the Department [of Labor] to recoup misspent grant funds is beyond challenge" (Pet. App. 52).

Petitioner also asserted that the length of time between the grant officer's receipt of the audit report and his issuance of the final determination barred the repayment order because the final determination was not issued within the 120-day period set forth in Section 106(b). The ALJ rejected this claim, holding that the failure to issue a final determination within 120 days "does not create a bar to the Department's

recoupment claim" (Pet. App. 54-55).[4] The ALJ's decision became the final decision of the Secretary (see 20 C.F.R. 676.91(f)), and petitioner sought judicial review in the court of appeals pursuant to 29 U.S.C. (Supp. V 1981) 817.

3. The court of appeals unanimously upheld the Secretary's determination (Pet. App. 1-32).[5] The court first rejected petitioner's claim that the Secretary's repayment order was invalid " 'because he failed to issue his Final Determination within 120 days of receipt of the audit' " (*id.* at 5). The court observed that the general rule in interpreting statutes such as Section 106(b) "directing that administrative action 'shall' be completed within a specified time * * * [is] that '[a] statutory time period is not mandatory unless it *both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision' " (Pet. App. 8, quoting *Fort Worth National Corp.* v. *FSLIC*, 469 F.2d 47, 58 (5th Cir. 1972) (emphasis added)). The court noted that Section 106(b) does not specify such a consequence and found no evidence that Congress intended to bar the Secretary of Labor from initiating an enforcement action after the expiration of the 120-day period.

The court of appeals further concluded that the legislative history of the 1973 CETA "significantly

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[4] The ALJ also rejected petitioner's claims that the grant officer bore the burden of proving that the funds were misspent and that the government's "trust obligations toward the Indian Tribes" barred the Secretary from recovering the misspent grant funds (Pet. App. 53-54).

[5] Petitioner did not dispute before the court of appeals "the merits of the finding that it misused CETA funds in the amount of $39,045.03" (Pet. App. 4).

strengthens the conclusion" that Section 106(b) was not intended to be a jurisdictional bar in instances of delay (Pet. App. 10). Specifically, the court noted that the 120-day period "originated as part of a provision whose purpose was to benefit the victims of prime sponsor non-compliance with CETA. It was not designed to give prime sponsors immunity for misuse of CETA funds unless there was a final determination within 120 days" (Pet. App. 13; citations omitted). The court emphasized that the discussion on the House floor concerning the amendment that became Section 106(b) made "unmistakably clear" that "the running of the deadline was not intended to let non-complying prime sponsors escape the consequences of their non-compliance" (Pet. App. 14, 15).

The court of appeals also rejected petitioner's claim that the Secretary had no authority to order repayment of the grant funds misspent by petitioner. Relying on *Bell* v. *New Jersey, supra*, the court held that Section 602(b) of the 1973 CETA granted the Secretary authority to order repayment of misused CETA grant funds (Pet. App. 20-32). The court noted that five other courts of appeals had relied on *Bell* to reach the same conclusion (Pet. App. 24). The court further stated that, aside from *Bell*, "the history and administrative background of the 1973 Act require the conclusion that the Secretary had authority under the 1973 CETA to order repayment of misspent funds by prime sponsors" (Pet. App. 26).[6]

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[6] In view of this determination, the court of appeals found no need to decide whether the Secretary's repayment order could be justified on the basis of the retroactive application of the 1978 CETA amendments or the government's common law right to recover misspent grant funds (Pet. App. 21).

Finally, the court of appeals held that petitioner was incorrect in asserting that the Secretary's repayment authority had been eliminated by the repeal of the CETA in 1982. The court found that the savings clauses in the Job Training Partnership Act of 1982, 29 U.S.C. 1591(d) and (e), preserved the Secretary's repayment authority under CETA with respect to this case (Pet. App. 31-32).

ARGUMENT

1. The first question presented in this case is the same as the issue now before the Court in *Brock* v. *Pierce County*, cert. granted, No. 85-385 (Nov. 4, 1985); *i.e.*, whether Section 106(b) of the 1978 CETA bars the Secretary of Labor from recovering misspent CETA funds when he fails to issue a final determination within 120 days.[7] Here, the court of appeals upheld a decision of the Secretary directing the repayment to the United States of misspent CETA funds despite the fact that the Secretary did not issue a final determination within 120 days. We demonstrated in our brief in *Pierce County* (at 11-32) that this interpretation of Section 106(b) is correct because it accords with a well-settled rule of statutory construction as well as the explicit legislative history and purposes of the CETA. With respect to this question, therefore, the Court should hold the petition pending its decision in *Pierce County*.

2. The court of appeals correctly determined that Section 602(b) of the 1973 CETA authorized the Secretary to order repayment of the CETA grant funds misspent by petitioner. All of the other courts of ap-

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[7] We have served counsel for petitioner with a copy of our brief in *Brock* v. *Pierce County*.

peals that have addressed the Secretary's authority to require repayment under Section 602(b) have reached the same conclusion. See *Mobile Consortium of CETA* v. *United States Department of Labor*, 745 F.2d 1416, 1418 (11th Cir. 1984); *California Tribal Chairman's Ass'n* v. *United States Department of Labor*, 730 F.2d 1289, 1291 (9th Cir. 1984); *North Carolina Commission of Indian Affairs* v. *United States Department of Labor*, 725 F.2d 238, 240-242 (4th Cir. 1984), cert. denied, No. 83-1981 (Oct. 1, 1984); *Texarkana Metropolitan Area Manpower Consortium* v. *Donovan*, 721 F.2d 1162, 1164 (8th Cir. 1983) (per curiam); *Atlantic County* v. *United States Department of Labor*, 715 F.2d 834, 835-837 (3d Cir. 1983) (per curiam). Moreover, this Court recently denied a petition for a writ of certiorari raising this issue. *North Carolina Commission of Indian Affairs* v. *United States Department of Labor*, cert. denied, No. 83-1981 (Oct. 1, 1984). Further review therefore is not warranted.[8]

As we discuss in detail in our brief in opposition in *North Carolina Commission of Indian Affairs* (at 6-13),[9] the Court's decision in *Bell* v. *New Jersey*, 461 U.S. 773 (1983), holding that the Secretary of Education may recover misused grant funds under the Elementary and Secondary Education Act, mandates the conclusion that the Secretary of Labor may re-

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[8] Petitioner suggests (Pet. 8) that this issue somehow is related to the question presented in *Pierce County*. However, as petitioner's arguments and the court of appeals' opinion both demonstrate, the issues are completely distinct (compare Pet. 6-7 with Pet. 8-11; compare Pet. App. 5-19 with Pet. App. 20-32).

[9] We have served counsel for petitioner with a copy of this brief in opposition.

cover misused grant funds under the substantially similar provision of the 1973 CETA statute. The factors relied upon in *Bell*—the statutory language, congressional intent, and consistent administrative interpretation of the statute—all demonstrate that the 1973 Act authorized the Secretary to require repayment of misspent CETA funds. See also Pet. App. 20-31.

Petitioner argues (Pet. 9-11) that *Bell* is inapposite because Section 106(d), a provision added to the CETA statute in 1978 that authorizes recoupment of misspent grant funds, would have been unnecessary if Section 602(b) authorized the recovery of such funds. However, the legislative history indicates that the 1978 CETA amendments were designed to "expand[] and clarif[y] existing law" (S. Rep. 95-891, 95th Cong., 2d Sess. 15 (1978)). Congress was aware of the Secretary's practice of requiring repayment of misspent funds. See 124 Cong. Rec. 25168 (1978) (statement of Rep. Hawkins); *id.* at 25221 (statement of Rep. Cornell); *id.* at 31021 (statement of Rep. Maguire); *id.* at 31026 (statement of Rep. Collins). In light of Congress's intent to clarify the Secretary's authority, it is not surprising "that in drafting the much more extensive and detailed provisions setting out the Secretary's authority [in 1978], Congress chose to make the Secretary's power to order repayment express" (Pet. App. 30-31).

Contrary to petitioner's assertion, moreover, the statute at issue in *Bell* contained similar provisions. The 1978 amendments to the Elementary and Secondary Education Act included an express repayment provision similar to Section 106(d) of the 1978 CETA amendments (see Pub. L. No. 95-561, § 185(b), 92 Stat 2191, 20 U.S.C. (Supp. V 1981) 2835(b)).

And this Court in *Bell* rejected a claim virtually identical to petitioner's argument here—that the original Education Act could not be construed to authorize recoupment of misspent grant funds because such an interpretation of that statute would render the 1978 amendment superfluous (see 461 U.S. at 788-789). Here, as in *Bell*, the provision added in 1978 expressly recognized the Secretary's recoupment authority and imposed procedural requirements relating to the dispute resolution process (compare 20 U.S.C. (Supp. V 1981) 2835 with 29 U.S.C. (Supp. V 1981) 816).[10] Thus, the 1973 CETA simply cannot be distinguished from the statute held to authorize repayment in *Bell*.[11]

Petitioner's argument (Pet. 12-13) that any repayment authority vested in the Secretary was lost when the CETA was repealed and replaced by the Job Training Partnership Act is mystifying. The Job Training Partnership Act expressly provides that the repeal of the CETA would "not affect administrative or judicial proceedings pending on October 13, 1982,

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[10] Petitioner attempts (Pet. 9-10) to distinguish the CETA from the Education Act on the ground that the 1978 CETA amendments both reenacted Section 602(b) and added Section 106(d); petitioner claims that Section 106(d) would have been unnecessary if Section 602(b) authorized repayment orders. However, the 1978 amendments to the Education Act similarly contained an express repayment provision (20 U.S.C. (Supp. V 1981) 2835(b)) and a provision authorizing payment adjustments similar to Section 602(b) of the CETA (see 20 U.S.C. (Supp. V 1981) 1226a-1).

[11] Since the 1973 CETA authorized the Secretary's repayment order, there is no need to address petitioner's argument (Pet. 11-12) that the repayment provision added by the 1978 amendments cannot be applied retroactively to uphold the repayment order.

or begun between October 13, 1982, and September 30, 1984" (29 U.S.C. 1591(e)). Since the administrative proceeding in this case was pending on October 13, 1982, the Secretary's authority under the CETA plainly was preserved by this provision. Furthermore, the grant officer's determination directing petitioner to repay the misspent funds to the United States was issued on September 28, 1981, and therefore was preserved by the statutory provision stating that "[a]ll * * * determinations * * * [issued on or before September 30, 1983] shall continue in effect until modified or revoked by the Secretary, by a court of competent jurisdiction, or by operation of law other than [the Job Training Partnership Act]" (29 U.S.C. 1591(d)).

Petitioner's unsupported assertion that these savings clauses only apply to "*Secretarial* determinations or proceedings based upon such determinations" (Pet. 13 (emphasis in original)) would impose a limitation that is contrary to the broad language of the savings clauses. Proceedings before the Secretary's designees —the grant officer and the ALJ—obviously are encompassed within the savings clauses.

CONCLUSION

As to Question 1, the Court should hold the petition and dispose of it as appropriate in light of the decision in *Brock* v. *Pierce County*. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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